TARA SINGH v. PUBLIC PROSECUTOR.

[A. C. J. (Buhagiar, J.) April 7, 1954]

[Ipoh — Criminal Appeal No. 10 of 1954]

Penal Code s. 338 — Causing grevious hurt by a rash or negligent act — Private prosecution — Irregularity — Criminal Procedure Code (Cap. 6), ss. 377 & 422.

This was an appeal against the conviction of the appellant at the Magistrate's Court at Kuala Kangsar on a charge of causing grievous hurt by a rash or negligent act an offence under section 338 of the Penal Code. The two grounds of appeal were:— (1) that section 377 of the Criminal Procedure Code is a bar to a private person conducting a prosecution for an offence under section 338 of the Penal Code which is a seizable offence, and the proceedings having therefore been conducted in contravention of section 377 of the Criminal Procedure Code were void; and (2) that the evidence did not disclose such a degree of negligence as would support a charge under section 338 of the Penal Code.

Held: (1) the fact that the proceedings were conducted by the complainant and not by any of the officers mentioned in section 377 of the Criminal Procedure Code was an irregularity but as it did not prejudice the appellant it was cured by the provisions of section 422 of the Criminal Procedure Code; (2) on the facts the evidence did not disclose such degree of negligence as would make the appellant criminally liable and therefore the appeal must be allowed.

Cases referred to :—

(1) *Subramania Ayyar v. King Emperor* I.L.R. 25 Mad. 61.

(2) *Abdul Rahman v. King Emperor* (1926) I.L.R 5 Rang. 53.

(3) *Kapoor Chand v. Suraj Prasad* (1933) I.L.R. 55 All. 301.

(4) *Emperor v. Bishan Sahai Vidyarthi* I.L.R. 55 All. 779.

(5) *Nidamarti Nagabhushanam* (1872) 7 M.H.C. 119.

(6) *Empress of India v. Idu Beg* (1881) I.L.R. 3 All. 776.

(7) *Smith v. Emperor* (1926), I.L.R. 53 Cal. 333.

(8) *Reg. v. Finney* (1874) 12 Cox, 625, 626.

(9) *Rex v. Bateman* 94 L.J.K.B. 791; 19 Cr. App. R. 8.

(10) *Gopal Rajaram v. Public Prosecutor* (1940) M.L.J. 101.

(11) *Cheow Keok v. Public Prosecutor* (1940) M.L.J. 103.

MAGISTRATE'S CRIMINAL APPEAL.

S. P. Seenivasagam for the appellant.

M. Garton (Federal Counsel) for the respondent.

Cur. Adv. Vult.

Buhagiar, J. : — The appellant was on the 9th January, 1954, tried at the Magistrate's Court at Kuala Kangsar on the following charge :—

"That you on 8.10.52 at about 5.30 p.m. in front of the Women's Hospital, Kuala Kangsar, did cause grievous hurt to one Puteh binti Lebai Saaid by doing an act, to wit, by overtaking another cyclist and then suddenly swerving to the left and collided with that cyclist so rashly or negligently as to endanger human life or the personal safety of the said Puteh binti Lebai Saaid and thereby committed an offence punishable under section 338 Cap. 45."

At the conclusion of the trial the appellant was found guilty on the charge, convicted and sentenced to a fine of $200 or two months rigorous imprisonment. The prosecution was not conducted by any of the officers mentioned in section 377 of the Criminal Procedure Code; it was conducted by the complainant Puteh binti Lebai Saaid.

The first ground of appeal on which counsel relied was that the offence under section 338 of the Penal Code is a seizable offence and the complainant had no status to prosecute. He submitted that section 377 of the Criminal Procedure Code is a bar to a private person conducting a prosecution. He also submitted that the appellant suffered prejudice by reason of the prosecution being conducted by an unauthorised person; in view of the serious nature of the charge it was essential that the prosecution should have been conducted by an impartial and duly authorised person who would have placed all the facts before the Court; the proceedings being conducted in contravention of the express provisions of section 377 of the Criminal Procedure Code are void or tainted by an irregularity which is not curable under section 422 of the Criminal Procedure Code. On this point he referred to the Privy Council decision in *Subramania Ayyar v. King Emperor*[1]; in that case a person was tried for 41 separate offences in direct contravention of the provisions of section 234 of the Indian Penal Code. Their Lordships held that the disobedience to an express provision as to a *mode of trial* did not come within the description of error, omission or irregularity. That case is not an authority for the proposition that whenever there is a disobedience to an express provision of law there is an illegality which cannot be cured; there are instances of disobedience to an express provision of law which are curable and which, for convenience, are referred to as irregularities.

The decision in *Subramania's case*[1] was considered by the Privy Council in *Abdul Rahman v. King Emperor*[2], which was a case of non-compliance with the provisions of section 360 of the Indian Criminal Procedure Code; *Subramania's case*[1] was distinguished

as "one which the Code positively prohibited and it was possible that it might have worked actual injustice to the accused", and section 537 of the Indian Criminal Procedure Code was held to cure the irregularity in not complying with the provisions of section 360. "To sum up", their Lordships said (at p. 69), "in the view which their Lordships take of the several sections of the Code of Criminal Procedure, the bare fact of such an omission or irregularity as occurred in the case under appeal, unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned, is not enough to warrant the quashing of a conviction, which on their Lordship's view, may be supported by the curative provisions of sections 535 and 537."

In *Abdul Rahman's case*[2] their Lordships did contemplate circumstances in which a defect in procedure might be incurable; *per contra* in *Subramania's case*[1] they did not say that an illegality in the form of trial is in all circumstances incurable. The two Privy Council decisions above referred to were the subject of consideration by a Full Bench of the Court of Allahabad in the case of *Kapoor Chand v. Suraj Prasad*[3], after considering the case of *Subramania*[1] the Court observed at p. 312:—

"In a later case, however, viz. **Abdul Rahman v. King-Emperor**[2], their Lordships pointed out, at page 125, that in the earlier case 'it was possible that it might have worked actual injustice to the accused.' It may be that their Lordships of the Privy Council in the later case, wanted to point out that section 537 of the Code of Criminal Procedure could not cure the defect in **Subramania Ayyar's case**[1] because the Code contained the provision that an irregularity, which had worked injustice to the accused, could not be cured. But it is significant that although their Lordships of the Privy Council drew a distinctton between an 'illegality' and an 'irregularity' in the earlier case, which was decided in the year 1901, the legislature did not introduce the word 'illegality' in section 537 or anywhere else in the Code, although it was amended after that year. This being the state of the law, we do not think that we should introduce a distinction between 'illegality' and 'irregularity'. The sole criterion given by section 537 is whether the accused person has been prejudiced or not. The object of procedure is to enable the court to do justice, but, if in spite of even a total disregard of the rules of procedure, justice has been done, there would exist no necessity for setting aside the final order which is just and correct simply because the procedure adopted was wrong."

See also *Emperor v. Bishan Sahai Vidyarthi*[4].

Applying the principles laid down in the above decisions, can it be said in this case that the appellant has been prejudiced by the fact that the proceedings were conducted by the complainant and not by any of the officers mentioned in section 377 of the Criminal Procedure Code? It has been suggested that if the proceedings were conducted as laid down in section 377 evidence might have been called which would have been favourable to the appellant, and that the fact that the Police did not take any action after the reports made by the complainant and the appellant shows that the Police considered that there was no ground to substantiate the charge. It was not shown, however, what evidence could have been called favourable to the appellant, and I do not consider that the appellant has been prejudiced by the disobedience to section 377 of the Criminal Procedure Code. I hold, therefore, that there was an irregularity which is cured by the provisions of section 422 of the Criminal Procedure Code.

The second ground of appeal relied on is that the decision of the learned Magistrate was against the weight of evidence which did not disclose any negligence on the part of the appellant and in any event did not disclose such a degree of negligence as would support a conviction on a charge of causing grievous hurt under section 338 of the Penal Code, and no intention to cause hurt was proved.

I do not think it is necessary to elaborate on the question of "intention." It is manifest that hurt intentionally caused cannot fall within either a "rash" or "negligent" act; rashness and negligence are wholly inapplicable to the case of an act or series of acts, themselves intended, which are the direct producers of hurt.

It is essential in cases of this nature to consider the evidence in detail. According to the complainant, Puteh binti Lebai Saaid, she was riding a bicycle along Idris Road, Kuala Kangsar. The appellant, on another bicycle, overtook her and then, without giving any indication as to where he intended going, turned left to go into a compound; in doing so the appellant's bicycle hit the front wheel of her bicycle, she was knocked down and sustained injuries. According to medical evidence, the complainant sustained a fracture of the tibia of the right leg; she was in plaster for three months and she was not fit to do her normal work for about six months after the accident. Prosecution witness Salleh bin Alang Abdullah stated: "Complainant was on the left hand side of the road and the defendant (appellant) was on the right hand side of the complainant. The defendant (appellant) a little bit in front. The front wheel of the defendant's (appellant's) bicycle was about a foot in front. Otherwise they were abreast. Then I saw the defendant (appellant) suddenly swerve to the left in order to go into a compound ... The defendant's (appellant's) bicycle knocked into the front wheel of the complainant's bicycle ... The rear wheel of the defendant's (appellant's) bicycle struck the front wheel

of complainant's bicycle. The distance between complainant and defendant (appellant) was about an armlength. Both were going at about the same speed because they were going downward incline."

The appellant stated: "I was going to deliver milk to Tara Singh. I was travelling on my left about two feet from the grass verge. On my turning to the left I gave indication with my left hand. I was not aware if any one was coming behind me. I had already turned to the left when there was a knock from behind. I turned round and saw the complainant had knocked into my bicycle." Defence witness Hassan bin Haji Arof stated that he is a tricycle driver; on the day in question he was peddling along the road where the incident occurred; arriving in front of the Women's Hospital he saw in front of him a Punjabi riding a bicycle; behind him was a woman also riding a bicycle; the Punjabi cyclist turned to the left; the front wheel of the woman's bicycle knocked into the rear wheel of the Punjabi's bicycle; the woman cyclist was about three feet behind the Punjabi cyclist.

On this evidence the learned Magistrate was of the opinion that the appellant's story was a later thought and he disregarded completely the evidence of defence witness Hassan because he did not believe that he was anywhere near the scene at the time of the incident. He also considered that the complainant's story was straight forward and simple and was substantially corroborated by the prosecution witness Salleh; from her demeanour in Court he was convinced that the complainant was telling the truth. The learned Magistrate found that the appellant came from behind the complainant, overtook her on her right and then suddenly turned to the left without any warning; he added that the complainant had no time to pull up. The learned Magistrate has had the advantage of seeing the witnesses in Court and I do not propose to interfere with the findings of fact except to add that there is evidence to show that the rear wheel of the appellant's bicycle collided with the front wheel of the complainant's bicycle.

The question to be decided on these facts is: Was the appellant's act rash or negligent within the meaning of section 338 of the Penal Code?

"Rashly" and "negligently" are distinguishable terms and one is exclusive of the other; the same act cannot be rash as well as negligent.

Rashness and negligence are nowhere defined in the Penal Code, but, as pointed out by Professor S. G. Vesey-Fitzgerald in an article (The Reform of the Law of Murder — see *Current Legal Problems* 1949 at p. 27), there are two definitions of these terms by great judges which are universally accepted as classic: by Holloway, J., in *Nidamarti's Case*[5], and by Straight, J., in *Idu Beg's Case*[6]. In *Nidamarti's Case*[5], Holloway, J., said (at p. 120) :—

> "Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the actor has taken sufficient precaution to prevent their happening. The imputability arises from acting despite the consciousness (luxuria). Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that if he had he would have had the consciousness. The imputability arises from the neglect of the civic duty of circumspection."

In *Idu Beg's Case*[6], Straight, J., at p. 780, said:

> "Criminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury, but without intention to cause injury, or knowledge that it will probably be caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted."

Adopting the principles laid down in these definitions, I do not consider that the appellant acted rashly within the meaning of section 338. The question whether he was negligent is perhaps more difficult to decide. There is no doubt that the act of the appellant was the immediate cause of the complainant being knocked down of the bicycle and sustaining injuries. It is unfortunate that the complainant suffered an injury which amounts to grievous hurt; there are many instances of persons being knocked down with no injuries at all or simply slight scratches.

As Kukerji, J., points out in *Smith v. Emperor*[7], the difficulty in dealing with a case of this nature is to keep out of one's mind the prejudice that inevitably creeps in by reason of the fact that an injury has been caused and the responsibility for the same ultimately rests with none else but the accused; this prejudice is bound more or less to reflect on the question of culpability of the accused and give rise to false issues which tend to cloud judicial vision.

If the appellant had taken more care when he decided to turn to the left, the accident would not have happened and he has been negligent, but as pointed out by Lush, J., in *Reg. v. Finney*[8]: "It is not every little trip or mistake that will make a person criminally liable." Before an accused can be convicted under section 338 there must be something more than a mere error of judgment or something more than mere carelessness.

A distinction is to be drawn between a negligent act or omission which gives rise to civil or criminal responsibility. In the latter case the test was laid down in the Court of Criminal Appeal by the Lord Chief Justice in *Rex v. Bateman*[9], quoted in *Gopal Rajaram v. Public Prosecutor*[10] as follows:—

"In explaining to juries the test which they should apply to determine whether the negligence in the particular case amounted or did not amount to a crime, the Judges have used many epithets such as 'culpable' 'criminal' 'gross' 'wicked' 'clear' 'complete'. But whatever epithet may be used and whether an epithet be used or not in order to establish criminal liability, the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment."

See also *Cheow Keok v. Public Prosecutor*[11].

In my opinion, the evidence tends to show that the appellant when swerving to the left misjudged the speed at which the complainant was travelling and thought that he could safely turn into the compound before the complainant reached the point of inter-section. This does not amount to negligence for which he is to be held criminally liable.

The appeal must be allowed and the conviction and sentence set aside. The fine, if paid, is to be refunded to the appellant.

Solicitors for the appellant: *S. Seenivasagam & Sons.*

LOW YEO FOONG & ORS. v. CHOP THONG CHEONG.

[O.C.J. (Buhagiar, J.) March 27, 1952]

[K. L.—Civil Suit No. 204 of 1951]

Landlord and tenant—Ejectment—Whether Court can interfere with Certificate given by the Rent Assessment Board under s. 13(1)(m) of the Control of Rent Ordinance, 1948, as amended by s. 11 of Ordinance No. 61 of 1949.

The plaintiffs (owners) were granted a Certificate by the Rent Assessment Board in terms of section 13(1)(m) of the Control of Rent Ordinance, 1948, to the effect that they intended to demolish the premises occupied by the defendant for the purpose of re-building and that in the opinion of the Board it was in the public interest that they should be permitted so to do. The plaintiffs were also given permission to apply to an appropriate Court for the ejectment of their tenant, the defendant, which they now apply, to do.

Held: the Court could not interfere with the Certificate of the Rent Assessment Board which was final and binding and therefore the defendant must vacate the premises.

Cases referred to:—

(1) *Smith v. Primavesi* (1921) W.N. 291.

(2) *Carltons Ltd. v. Commissioners of Works & Ors.* (1943) 2 All E.R. 560.

(3) *Attorney-General v. A. W. Gamage Ltd.* (1949) 2 All E.R. 732.

ACTION FOR EJECTMENT.

Cur. Adv. Vult.

Buhagiar, J.: —The only point to be decided in this case was whether this Court could interfere with the certificate given by the Rent Assessment Board under paragraph (m) of sub-section (1) of section 13 of the Control of Rent Ordinance, 1948 (M.U. No. 6 of 1948). That section (as amended by section 11 of Ordinance No. 61 of 1949) provides as follows:—

"No order or judgment for the recovery of possession of any premises comprised in a tenancy shall be made or given except in the following cases, namely—

(m) where the President or Chairman of the Board has certified that the Board is satisfied that the owner of the premises intends to demolish them for the purpose of rebuilding and in its opinion it is in the public interest that he should be permitted so to do:

Provided that an order or judgment shall not be made or given under this paragraph unless the Court is satisfied that the owner of the premises has complied with any order or conditions which the Board may have seen fit to make or impose:"

The plaintiffs are the owners of premises known as No. 53, Cross Street, Kuala Lumpur. The defendant is the tenant of those premises.

On the 9th March, 1951, the plaintiffs applied to the Rent Assessment Board for the Municipal Area of Kuala Lumpur praying for:—

(a) an order granting them permission to apply to the appropriate Court at Kuala Lumpur for the ejectment of the defendant from the said premises; and

(b) for a certificate in terms of paragraph (m) of subsection (1) of section 13 of the Control of Rent Ordinance.

On the 2nd June, 1951, the Board granted permission as in paragraph (a) above and a certificate as follows:—

"I, PAWAN TEH, President of the Rent Assessment Board for the Municipal Area of Kuala Lumpur HEREBY CERTIFY that the Board is satisfied that Low Yeo Foong, Chong Pong Yew alias Yong Pong Yew, Loh Hin Nen, Low Leong Fiew and Wong Fong Yen intend to demolish the premises known as 53 Cross Street, Kuala Lumpur, for the purpose of rebuilding and that in the opinion of the said Board it is in the public interest that the said Low Yeo Foong, Chong Pong Yew alias Yong Pang Yew, Loh Hin Nen, Low Leong Fiew and Wong Fong Yen be permitted to do so".

I considered that the Court could not interfere with this certificate; it was final and binding. In *Smith v. Primavesi*[1] it was held that a certificate under section 5(1)(i)(ii) of the Increase of Rent, etc. (Restriction) Act, 1920, was final and conclusive and when produced the Court ought to act upon it. It is an established principle that where a discretion is conferred on an authority by statute the Courts